No. _____

In The

Supreme Court of the United States

October Term, 1991

RAMON CALERO, JIMMIE CALERO, and
ZOLIA ROSA ARDILLA DE VIRGIL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED DUE PROCESS BY THE COURT UTILIZING THE PREPONDERANCE OF EVIDENCE STANDARD IN THIS CASE.

II. WHETHER THIS COURT AS A POLICY MATTER SHOULD REQUIRE A CLEAR AND CONVINCING TEST IN SITUATIONS WHERE A SIGNIFICANT INCREASE IN THE LENGTH OF INCARCERATION IS INVOLVED IN THE QUESTION OF FACT TO BE DETERMINED AT SENTENCING.

III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE CONDUCT INVOLVED 50 KILOS OF COCAINE UNDER THE PREPONDERANCE OF EVIDENCE STANDARD.

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RAMON CALERO, JIMMIE CALERO and ZOLIA ROSA ARDILLA DE VIRGIL, Petitioners herein, by and through their appellate attorney of record, CHARLES LOUIS ROBERTS, hereby petitions this Court to grant a Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The Opinion of the panel of the United States Court of Appeals for the Fifth Circuit in *United States v. Ramon*

Calero, Jimmie Calero and Zolia Rosa Ardilla de Virgil, No. 90-8402 was entered as an unpublished Slip Opinion on October 29, 1991, and is reproduced herein as App. 1.

JURISDICTION

The Opinion of the panel of the United States Court of Appeals for the Fifth Circuit entered on October 29, 1991, This Petition is timely filed within ninety (90) days of October 29, 1991, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED

1. The United States Constitution Amendment V reads as follows in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .
>
> *United States Constitution, Amendment V*

2. The United States Code, 28 U.S.C. § 991 reads as follows:

> § 991. United States Sentencing Commission; establishment and purposes
>
> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after

consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President of the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designed, shall be an *ex officio*, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while

maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **[Emphasis supplied]**.

28 U.S.C. § 991

3. The United States Code, 28 U.S.C. § 3553 reads as follows:

§ 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. – **The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)** of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) The nature and circumstances **of the offense** and the history and characteristics of the defendant;

(2) the need for the sentence to be imposed –

(A) to reflect the seriousness **of the offense,** to promote respect for the law, and to provide just punishment **for the offense;**

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records **who have been found guilty of similar conduct;** and

(7) the need to provide restitution to any victims **of the offense.** [Emphasis supplied]

18 U.S.C. § 3553

4. The *Federal Sentencing Guidelines,* § 1B1.3 reads as follows:

§ 1B1.3 *Relevant Conduct (Factors that Determine the Guideline Range)*

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

Federal Sentencing Guidelines Manual at p. 18

STATEMENT OF THE CASE

RAMON CALERO, JIMMIE CALERO and ZOLIA ROSA ARDILLA DE VIRGIL were indicted by a grand jury on February 7, 1990, for conspiring to possess more than five kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The grand jury

also indicted RAMON on two counts of use of a communication facility to facilitate the commission of a felony. Prior to trial, each of the three defendants filed motions to suppress any evidence discovered by the government as a result of the events at the airport involving the cosmetics case. The district court denied these motions after hearing oral testimony. After a jury found the three defendants guilty, RAMON received a sentence of 213 months imprisonment for the conspiracy charge and concurrent sentences of 48 months imprisonment for each of the other charges against him. His sentence also included three concurrent five-year terms of supervised release, a $5,000 fine, and a special assessment of $150. JIMMIE and DE VIRGIL received respective sentences of 188 months and 97 months imprisonment for conspiracy. In addition, JIMMIE and DE VIRGIL were sentenced to five-year terms of supervised release and to special assessments of $50 each.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE PETITIONER WAS DENIED DUE PROCESS BY THE COURT UTILIZING THE PREPONDERANCE OF EVIDENCE STANDARD IN THIS CASE.

II. THIS COURT AS A POLICY MATTER SHOULD REQUIRE A CLEAR AND CONVINCING TEST IN SITUATIONS WHERE A SIGNIFICANT INCREASE IN THE LENGTH OF INCARCERATION IS INVOLVED IN THE QUESTION OF FACT TO BE DETERMINED AT SENTENCING.

III. THE TRIAL COURT ERRED IN FINDING THAT THE OFFENSE CONDUCT INVOLVED 50 KILOS OF COCAINE UNDER THE PREPONDERANCE OF EVIDENCE STANDARD.

I. Reasons Why The Writ Should Be Granted:

At sentencing the following occurred:

[By the Court:]

> With regards to the amount in controversy, in listening to the tapes, it seems to me very clear that the amount was the fifty kilograms, and that they were, in fact, capable of doing that. That they did not do it is something else. I'll get back to this later, because it seems to me, it's just, for the, for both Jimmie Calero and Ramon Calero, the consequences of negotiating fifty kilograms is just unbelievable. But I think that the tapes themselves indicate what occurred with the fifty kilograms.
>
> So the objection is overruled.

(R XII 13)

* * *

Again, the Court adopts the statements of the Presentence Report as to findings that there are no objection. The Court sustains the objection to the leadership role, sustains the objection to the weapon, overrules the fifty kilogram objection, and finds that that was what was negotiated, and seriously considered. And leaves the, statements as to Carpenter within the Presentence Report.

* * *

So, the Court finds no reason to depart from the sentence called for by the application of the Guideline, inasmuch as the facts as are found are of the kind contemplated by the Sentencing Commission. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant, Ramon Calero, is hereby committed to the custody of the Bureau of Prisons for imprisonment for a term of two hundred and thirteen months. That's two years above your brother. The Court sentences the Defendant, excuse me. The Court sentences the defendant at the midpoint of the range, given the negotiation leadership that Ramon Calero participated in.

It is further ordered that he be sentenced to two hundred and thirteen months on Count 1, and forty-eight months on Counts 2 and 3, to run concurrently. Concurrently, not consecutively, but concurrently with Count 1.

(R XII 16, 21-22)

B. THE LEGAL BASIS:

1. In General:

In this case, it was claimed that a 50 kilo amount (cocaine) applied because that amount was mentioned in negotiation; however, it is also true: (1) that many amounts were mentioned such as 50, 40, 25, 20, etc.; (2) that no firm amount had been agreed upon until the final transaction; and, (3) that the final transaction only involved one kilo for $10,000.00, (another approximately $111,000.00 representing 10 or 11 additional kilos was seized from an alleged co-conspirator. The Petitioner argues that the one kilo amount should have been used to come up with 12 kilos instead of the 50 kilos specified in the Presentence Report (P.S.I.). The difference between the two amounts resulted in a change from level 32 to level 36 which represents a change in sentencing range from a low of 121 months to a high of 235 months.

2. Clear and Convincing:

The Petitioner argues that in this particular case the federal courts should utilize the clear and convincing test because the quantum from one kilo (or twelve kilos) to 50 kilos results is the sort of situation envisioned in *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) where the "tail" wags the "dog" of the substantive offense. Here the amount involved was a change from a low of 121 months to a high of 235 months which is a doubling of the sentence. The Third Circuit has indicated in such cases that the clear and convincing test should apply instead of the regular preponderance test, holding that:

Because less procedural protection is so clearly appropriate in the majority of sentencing cases we sometimes tend to regard it as appropriate in all sentencing cases. However, legal rules – even rules that function perfectly well in familiar contexts when stated in categorical terms – cannot always be applied in extreme situations.

* * *

Here, however, we are dealing with findings that would increase Kikumura's sentence from about 30 months to 30 *years* – the equivalent of a 22-level increase in his offense level, *see id.* Ch. 5, Pt. A. This is perhaps the most dramatic example imaginable of a sentencing hearing that functions as "a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88, 106 S.Ct. at 2417. In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations.

* * *

McMillan held that a preponderance standard was generally constitutional but suggested that a different question would be presented if the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as "a tail which wags the dog of the substantive offense," 477 U.S. at 88, 106 S.Ct. at 2417. For the reasons explained above, we hold that in such situations, the fact-finding underlying that departure must be established at least by clear and convincing evidence. Because Kikumura requested no higher standard of proof in his sentencing memorandum, we assume without deciding that the clear

> and convincing standard is sufficient in such cases.
>
> ***United States v Kikumura,***
> **918 F.2d 1084, 1100, 1101 (3rd Cir. 1990)**

Likewise, the Eighth Circuit has held that in certain circumstances this clear and convincing test might be required by the due process clause of the Constitution:

> We do not foreclose the possibility that in an exceptional case, such as this one, the clear and convincing standard adopted by our sister circuit might apply. Nevertheless, we do not adopt the clear and convincing standard here. Rather, we leave that question for another day, because in our view, the Government's evidence cannot withstand scrutiny even under the preponderance standard applicable to the usual case. *See United States v. Malbrough*, 922 F.2d 458, 464 (8th Cir. 1990).
>
> The Government urges us to uphold the district court's determination with respect to (1) the 1,857 grams of cocaine from Blunt's apartment, and (2) the four kilograms of cocaine from the bus station incident. However, for the reasons discussed below, we possess a definite and firm conviction that consideration of these quantities constituted error. Accordingly, we reverse. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948).
>
> ***United States v Townley,***
> **929 F.2d 365, 369-70 (8th Cir. 1991)**

cf: United States v. Affleck, 861 F.2d 97 (5th Cir. 1989). The Petitioner asks this Court to reassess its previous position and apply the clear and convincing test in this case

because of the tremendous increase of penalties involved here.

3. Why this Court Should Adopt the Clear and Convincing Test in Special Cases:

The Petitioner would argue that this Court should adopt a clear and convincing standard to be applied in cases where a significant change in the length of incarceration is involved in the resolution of a fact at the sentencing hearing. This is especially true in our situation where federal narcotics agents are the pretend sellers of a mythical quantity of narcotics. These agents who are presumably aware of the sentencing consequences are free to initiate discussions and make remarks about whatever amounts they choose to pick. Likewise, narcotics defendants are often prone to play along with the comments of such agents in order to appear to be big dealers or to remain "in the game" although intending only to purchase a much smaller amount. Circuit Judge OAKES' thoughtful concurring opinion in *United States v. Lee*, 818 F.2d 1052 (2nd Cir. 1987) points this out very well in his recommendation that clear and convincing tests be applied as a policy matter:

> I think we may very well want to hold at some future time in some other context that proof by clear and convincing evidence is required as a matter of policy. See, e.g., Note, A Proposal to Ensure Accuracy in Presentence Investigation Reports, 91 Yale L.J. 1225, 1245 nn. 115-17 (1982). As note 117 points out, this is the standard of proof required in analogous situations by the Supreme Court. *See Addington v. Texas*, 441 U.S.

418, 433, 99 S.Ct. 1804, 1813, 60 L.Ed.2d 323 (1979) (involuntary civil commitment hearing).

United States v. Lee,
818 F.2d 1052, 1058 (2nd Cir. 1987)
(OAKES, Circuit Judge (concurring))

Circuit Judge OAKES pointedly compares the situation to that of involuntary commitment where this court had previously required a clear and convincing test of the evidence, *Addington v. Texas*, 441 U.S. 418 (1979).

A simple preponderance of evidence test judged by the appellate courts in a "clearly erroneous view" provides little or no protection for wrongful sentences which involve extremely lengthy periods of incarceration without parole under the *Federal Sentencing Guidelines*.

4. Preponderance of the Evidence:

In the alternative, the Petitioner asserts that even under the preponderance of evidence standard, the Petitioner should not have been assigned a base offense level calculated on the amount of 50 kilos. The government asserted that because 50 kilos was the highest amount mentioned that it should be used irregardless of the fact that the actual transaction coupled with all the cash seized did total one fourth of this amount. While such a construction is possible it is hardly plausible. It is at least equally plausible if not more plausible that RAMON CALERO had no idea how much money he could raise; or that he was "puffing" to keep the agent's interest; etc. There is, of course, a serious problem when a sentencing court encounters improvable factual theories which are equally plausible. In confronting this problem, the Sixth

Circuit has held that the Trial Court is compelled to err on the side of caution and on the side of leniency to the defendant:

> Findings of fact important to calculating a defendant's offense level or criminal history category must generally be made by a preponderance of the evidence. *See, e.g., Wilson,* 900 F.2d 1350 (9th Cir. 1990); *Fredericks,* 897 F.2d 490 (10th Cir. 1990); *McDowell,* 888 F.2d at 290-91; *Guerra,* 888 F.2d at 250-51; *Urrego-Linares,* 879 F.2d at 1237-38; *Wright,* 873 F.2d at 441-42. This standard is difficult to apply when a number of plausible theories concerning the quantity of drugs are presented and the evidence is insufficient to say that any one choice is more likely than not true. Relying on relevant commentary to the guidelines which directs the sentencing judge to "approximate the quantity of the controlled substance," the government asserts that a preponderance of the evidence standard should be relaxed when a trial judge must choose between a number of plausible estimates concerning the quantity of drugs involved in a conspiracy case. Former Application Note 2 to U.S.S.G. § 2D1.4. In the context of such approximations, the government believes that "preponderance of the evidence" should be defined as "at least as much evidence as that in support of any alternative finding."
>
> * * *
>
> Adopting the standard urged by the government could result in a defendant being held responsible for a quantity of drugs that is more likely than not in excess of the quantity for which the defendant is actually responsible.

> Applied literally, it could permit a finding based on no evidence.

United States v Walton
908 F.2d 1289, 1301, 1302 (6th Cir. 1990)

* * *

> Thus when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution.

* * *

> Allowing a court to find a defendant responsible for the maximum quantity of drugs that can plausibly be found could result in defendant receiving excessive sentences based on a finding of quantity that is more likely than not excessive. Such a result would violate defendant's due process rights. *See Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690 (1948) (sentences may not be based on "materially false" information); *McDowell*, 888 F.2d 290-91; *Wilson*, 900 F.2d at 1353. While this may result in an underestimation of the quantity of drugs involved in some few cases, we believe it is nonetheless constitutionally required to prevent excessive sentences.

United States v. Walton
908 F.2d 1289, 1301, 1302 (6th Cir. 1990)

The Petitioner asks this court to review the circumstances and come to a similar result in this case.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioners pray that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter vacate their sentences and remand their causes for resentencing.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8402

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAMON CALERO, JIMMIE CALERO and ZOLIA ROSA ARDILLA DE VIRGIL,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas
(EP 90 CR 59 1)

(October 29, 1991)

Before THORNBERRY, DAVIS and WIENER, Circuit Judges.

Per Curiam:*

In this drug conspiracy case, the defendants appeal their convictions of conspiracy to possess more than five kilograms of cocaine with intent to distribute, in violation

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of 21 U.S.C. §§ 841(a)(1) and 846. Finding that the district court committed no reversible error, we AFFIRM.

I.

FACTS

On January 17, 1990 a confidential informant ("C.I.") arranged a meeting between prospective buyers of cocaine and Drug Enforcement Administration ("DEA") agents Carlos Gonzales and Donnie Garcia. The DEA agents were to pose as sellers of cocaine in a "reverse sting operation." The meeting was to be held in the parking lot of a furniture store in El Paso, Texas. At 5:30 p.m. that day, the C.I. arrived at the designated meeting place with defendants Ramon Calero (Ramon) and Jimmie Calero (Jimmie), who are brothers. Larry Guerra of the El Paso County Sheriff's Department accompanied the DEA agents in an undercover capacity. At the meeting, which a surveillance team recorded on video tape, Guerra and the C.I. distanced themselves from the DEA agents and the defendants so as not to participate in the negotiations. Ramon stated to the DEA agents that he wanted to buy cocaine, and the amount of fifty kilograms was mentioned. The parties agreed to a price of $10,000 per kilogram. According to the defendants, Jimmie did not know the purpose of the meeting, stood at a distance from his brother and the DEA agents, and did not participate in their conversation. The government maintains, however, that Jimmie stood immediately behind Ramon and offered suggestions to him throughout the meeting, and that during the meeting Jimmie stated to the agents that he wanted to perform quality tests on the cocaine.

On the morning of January 18, 1990, DEA agent Garcia conducted a recorded telephone conversation with Ramon. In this conversation, Garcia told Ramon that he was hesitant to go forward with the deal because he was afraid that Jimmie was a policeman. Ramon denied this and explained to Garcia that Jimmie's job was to "take care of" Ramon and to "watch [his] back."

In another recorded telephone conversation with Ramon that morning, agent Gonzales expressed his doubts about Ramon's ability to complete the deal. Ramon responded that he could and that his "friend," whom the agents interpreted to be the C.I., could vouch for him. Ramon and agent Gonzales agreed in this conversation that after the buyers showed the sellers one-half of the money, the sellers would show the buyers the cocaine, from which the buyers could take samples.

At approximately 12:55 p.m. on January 18, Ramon called the undercover telephone number and spoke with agent Garcia. In this recorded conversation, Ramon stated that he was ready to proceed with the transaction, but that he wanted to "meet somewhere to talk" before doing so. Ramon and Garcia arranged a meeting to take place at a local K-Mart, and agent Gonzales met Ramon at the K-Mart at approximately 1:30 p.m. Ramon was accompanied by an unidentified person who remained in Ramon's vehicle and did not participate in the meeting. Jimmie was not present. At this meeting, which was not recorded, DEA agent Gonzales confirmed that if the buyers would show one-half of the money, the sellers would produce all of the cocaine. Ramon discussed the possibility of buying one-half of the cocaine in one transaction and the other half in a separate transaction.

At approximately 5:00 p.m. on January 18, Ramon called the agents, who received the call on a cellular telephone and were unable to record the conversation. According to the government, Ramon stated during this conversation that the buyers wanted to buy fifty kilograms of cocaine in two separate twenty-five kilogram transactions. About an hour later, Ramon called the agents and, in a recorded conversation, stated that his money was being flown in to El Paso that night, and that the agents should call him the next morning at 9:00 to complete the transaction.

On the morning of January 19, 1990, El Paso Police Department Narcotics Detective Jose Castro, who was not involved in or aware of the DEA's investigation of the Calero brothers, received information from Keith Griffin of the Dallas-Fort Worth Airport Task Force about a woman named Zolia Soto, who was flying from New York to El Paso that day on a particular American Airlines flight. Griffin informed Castro that Soto had purchased a round-trip ticket for over $2,000 in cash, was scheduled to arrive in El Paso on the 19th and return to New York on the 20th, and had no luggage except for a purse and small cosmetics case. Griffin gave Soto's physical description to Castro.

Castro and his partner, Officer Veliz, stationed themselves at the gate at which Soto's flight was to arrive. While waiting for the flight, Castro observed a man and a woman, later identified as Ramon and his wife, Sylvia, who appeared to be waiting for the same flight. Castro noticed that Ramon seemed nervous, paced back and forth, and glanced at Castro from time to time. When the flight arrived, an individual matching the description of

Soto (who was later identified as defendant De Virgil) disembarked and approached Ramon and Sylvia. There were no apparent greetings or formalities among the three. Instead, Sylvia immediately took the cosmetics case from De Virgil, after which Ramon immediately took the case from Sylvia and started walking away from the gate area, followed by the two women. Castro and Veliz followed the threesome. Ramon began walking at a normal pace, but quickened as he neared the exit of the airport building. The officers overtook the group near the automatic doors of the exit, and Castro identified himself to the threesome.

Castro asked De Virgil if he could talk to her, and she consented. He asked her to move out of the way of the doors and to bring all of her "stuff," including the cosmetics case. De Virgil replied that she did not have a cosmetics case, but when Castro informed her that he had seen her disembark with it, De Virgil asked Castro to get it for her. Castro asked Ramon for the case, and Ramon replied that it was his. Castro informed Ramon that he had seen De Virgil with the case and that she had asked Castro to get it for her. Ramon then gave the case to Castro without any struggle. Castro then asked De Virgil for her plane ticket, which she produced. The ticket was in the name of "Julia Soto" and included a ticket for a return flight date for the following day, January 20, 1990. When asked when she planned to return to New York, De Virgil replied, "in three or four days," but when confronted with the ticket she changed her answer to the next day.

Castro then asked De Virgil for some identification, and she opened her purse, in which Castro saw what he

believed to be about $20,000 in cash. De Virgil stated that she could find no identification, and Castro asked her if she would mind if he looked inside of the cosmetics case. She agreed and began to turn the combination lock on the case. But when she glanced past Castro to Ramon, who was shaking his head from side to side, De Virgil stated that she had forgotten the combination, but that she could get it by making a phone call to New York. Castro told her that she could call from his office there at the airport. She agreed, and they began to walk to Castro's office together. Ramon and Sylvia were interviewed briefly by Officer Veliz and released.

While walking to the office, De Virgil asked Castro how he knew about the money, and, when Castro asked her how much money was involved, she responded $38,000. De Virgil offered Castro $10,000 to let her go, but Castro did not interpret this as a bribe because he believed that she was confused. At the office, De Virgil admitted that she did not need to make the phone call to obtain the combination, and proceeded to open the case. In addition to a few personal items, the case contained $111,161 in cash. When asked about the purpose of the money, De Virgil stated that she had the money to buy "pretty rocks" at Ramon's father's rock shop, and that people often gave her cash to buy rocks for them. De Virgil stated that she had purchased about $10,000 worth of rocks from the Caleros in the past year. Detective Castro left the office to perform other duties, and Sergeant Paul Irwin of the El Paso Police Department continued to interview De Virgil. Later, the interview was turned over to DEA agent Dean Sullivan.

While questioning De Virgil, Sullivan received a call from DEA agent Gonzales, who informed him of the undercover investigation of the Caleros and asked whether Sullivan had seized any large amounts of money at the airport. Gonzales instructed Sullivan to arrest De Virgil after Sullivan informed him of the events concerning De Virgil, Ramon and Sylvia. Gonzales had received a call approximately twenty minutes earlier from Ramon, who informed Gonzales that he still wished to consummate the deal, but that the money had not yet arrived, and that he first wanted to purchase a one kilogram sample for $10,000.

Ramon and Gonzales agreed to meet that afternoon at an El Paso fast food restaurant. At this meeting, portions of which were recorded on videotape, Gonzales gave Ramon three pictures of the purported cocaine. Ramon led Gonzales to a parked vehicle, in which the C.I. was sitting, and showed Gonzales a white paper sack containing the $10,000. Ramon was immediately arrested. During this meeting, DEA agents observed Jimmie in a parked vehicle at a gas station across the street about 200 feet away, and he was arrested shortly thereafter while driving away from the scene.

II.

Ramon, Jimmie, and De Virgil were indicted by a grand jury on February 7, 1990, for conspiring to possess more than five kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The grand jury also indicated Ramon on two counts of use of a communication facility to facilitate the commission of a

felony. Prior to trial, each of the three defendants filed motions to suppress any evidence discovered by the government as a result of the events at the airport involving the cosmetics case. The district court denied these motions after hearing oral testimony. After a jury found the three defendants guilty, Ramon received a sentence of 213 months imprisonment for the conspiracy charge and concurrent sentences of 48 months imprisonment for each of the other two charges against him. His sentence also included three concurrent five-year terms of supervised release, a $5,000 fine, and a special assessment of $150. Jimmie and De Virgil received respective sentences of 188 months and 97 months imprisonment for conspiracy. In addition, Jimmie and De Virgil were sentenced to five-year terms of supervised release and to special assessments of $50 each.

III.

DISCUSSION

We are faced with numerous issues in this appeal. First, all three defendants argue that the evidence is insufficient to support conspiracy convictions. In addition, Ramon and De Virgil assert that (1) the district court erred by denying their motions to suppress evidence; (2) the district court erred by admitting testimony concerning Jimmie's previous, unrelated drug dealing activity; and (3) the district court erred by denying their motions to sever. De Virgil argues that the district court erred by refusing to give her requested jury instruction. Finally, Ramon and Jimmie contend that the district court erred in its determination of the amount of cocaine involved in

the proposed transaction when the court imposed their sentences.

A. Sufficiently of the evidence

In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the government, with all reasonable inferences and credibility choices made in support of the jury's verdict.[1] The standard of review is whether any rational trier of fact could have found all elements of the crime beyond a reasonable doubt.[2] For a conviction of conspiracy to possess cocaine with intent to distribute, the government must prove beyond a reasonable doubt: (1) the existence of a conspiracy and each co-conspirator's (2) knowledge of the agreement, (3) intent to join the conspiracy, and (4) participation in the conspiracy.[3] In a drug conspiracy case, the government does not have to show an overt act in furtherance of the agreement, and the conspiracy need not be proven by direct evidence but can be inferred from a "development and a collocation of circumstances."[4]

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[1] *United States v. Prieto-Tejas*, 779 F.2d 1098, 1101 (5th Cir. 1986.)

[2] *Id.*

[3] *Id.* at 1102.

[4] *Id.* at 1103 (quoting *Untied States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962 (1979)).

(1) De Virgil

Appellant De Virgil argues that the evidence fails to show her knowing and willing participation in a conspiracy. She cites *United States v. Jackson*,[5] in which this court stated that it "will not lightly infer a defendant's knowledge and acquiescence in a conspiracy," that "a showing that the defendant merely associated with those participating in a conspiracy is insufficient," and that the government cannot prove a conspiracy by presenting evidence that only places the defendant in 'a climate of activity that reeks of something foul.' "[6]

According to De Virgil, the only evidence linking her to any conspiracy is a hearsay statement by co-defendant Ramon in a recorded telephone conversation that "the money was being flown in." De Virgil asserts that a co-conspirator's hearsay statement may not be used to prove her membership in the conspiracy, relying on *United States v. White*.[7]

In *White*, a husband and wife were convicted of conspiracy to possess heroin with intent to distribute. The only evidence of the existence of a conspiracy was (1) testimony by a DEA agent that a co-defendant identified the couple as his "connection;" (2) testimony by an informant concerning another co-defendant's statement and the informant's interpretation of this statement as

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[5] 700 F.2d 181, (5th Cir.), *cert. denied sub nom. Hicks v. United States*, 464 U.S. 842 (1983).

[6] *Id.* at 185.

[7] 569 F.2d 263, 267 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978).

meaning that the co-defendant was selling heroin for the wife; (3) discussions between the informant and the husband about the possibilities of the informant becoming a dealer; (4) similar but separate discussions between the informant and the wife; and (5) the fact that the two were married, lived together and frequented the same bar.

White held that the co-defendants' statements testified to by the DEA agent and the informant were co-conspiratorial hearsay and not admissible to prove the existence of a conspiracy. The court stated that the test is "whether other evidence would establish a prima facie case of the conspiracy and the defendant's participation therein."[8] The court applied this test and concluded that, excluding these statements, the evidence was insufficient to establish a conspiracy between the husband and wife beyond a reasonable doubt.

In the trial of the instant case, De Virgil did not object to Ramon's statement as inadmissible hearsay. As a result, she may not and does not complain on appeal that it was error for the district court to admit the statement. Had she preserved this complaint and raised it on appeal, we would have used the test mentioned in *White*. Under this well-established test, we would have considered all evidence other than Ramon's statement to determine if a conspiracy existed. If the independent evidence showed that a conspiracy existed, Ramon's statement would be admissible under the co-conspirator exception to the hearsay rule.[9]

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[8] *Id.*

[9] *United States v. James*, 510 F.2d 546, 549 (5th Cir.), *cert. denied sub nom. Vasquez v. United States*, 423 U.S. 855 (1975).

As De Virgil cannot complain that Ramon's statement was inadmissible hearsay, her argument appears to be that *White* found a new application for the co-conspirator exception test. She argues that *White* established the rule that, in reviewing a claim that there is insufficient evidence to support a conspiracy conviction, this court must ignore all statements made by co-defendants and consider only the remaining evidence. Thus, she asserts that even though she did not object to the admission of Ramon's statement, we may not consider the statement in determining whether the evidence was sufficient to support her conviction.

We need not and do not decide whether *White* should be interpreted as De Virgil asserts because, with or without Ramon's statement, the evidence is sufficient to support De Virgil's conviction. Ramon had agreed to purchase large quantities of cocaine from the undercover DEA agents in a cash transaction. De Virgil flew from New York to El Paso on short notice under an assumed name, arriving on the day the drug transaction was to occur. Ramon met De Virgil at the airport and immediately took her only piece of luggage, a small, hand-carried cosmetics case which contained over $110,000 in cash. Although by no means overwhelming, this evidence, when viewed in a light most favorable to the government, is sufficient for a rational jury to find beyond a reasonable doubt that De Virgil was a member of a conspiracy.

(2) Jimmie Calero

Jimmie asserts that his mere presence with Ramon at various times during the drug transaction is not enough

to support a conviction for participation in a drug conspiracy, relying on *United States v. Espinoza-Seanez*,[10] *United States v. Gardea-Carrasco*,[11] and *United States v. Blessing*.[12] Jimmie claims that he was not a party to the conversations between Ramon and the DEA agents at the first meeting in the furniture store parking lot on January 17, 1990, and that he was ignorant of the purpose of the meeting. He also asserts that, although he was across the street from the fast food restaurant when Ramon was arrested on January 19, he was ignorant of the purpose of Ramon's meeting there. He claims that Ramon had asked him for a ride to the restaurant and that he had merely gone to buy gasoline while Ramon went across the street to buy something to eat.

The conversations during the first meeting were not recorded, but the meeting was video taped from a distance by a DEA surveillance team. This video tape is not very helpful in determining whether Jimmie participated in the meeting because of the conditions under which the tape was made. As the meeting occurred at dusk, the lighting was poor, and the video was shot from inside a vehicle through a tinted window. In addition, the video was shot from such an angle that throughout much of the meeting view of Ramon and the DEA agents were blocked by Ramon's vehicle and were not visible. As a result, although Jimmie is visible and appears to be on the same side of Ramon's vehicle as Ramon and the

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[10] 862 F.2d 526, 537 (5th Cir. 1988).

[11] 830 F.2d 41, 45 (5th Cir. 1987).

[12] 727 F.2d 353, 356 (5th Cir. 1984), *cert. denied sub nom. Rodriguez v. United States*, 469 U.S. 1105 (1985).

agents, it is impossible to determine from the video his proximity to the negotiations or his level of participation therein, if any.

Nevertheless, the record contains testimony by the DEA agents that Jimmie did participate in the January 17 meeting by requesting samples of the cocaine for testing and giving Ramon suggestions while Ramon discussed the transaction with the DEA agents. This testimony is corroborated by a recorded telephone conversation between DEA agent Garcia and Ramon on the morning of January 18. In this conversation, Ramon requested a picture or sample of the cocaine. Garcia responded by stating that it would be too much trouble to show as many samples as "your buddy Jim" wanted. Ramon did not deny that "Jim" had asked for samples. Had Jimmie not made this request at the meeting, agent Garcia would have no reason to make this statement to Ramon in the telephone conversation. The record also contains evidence of a statement by Ramon in the same telephone conversation that Jimmie's purpose was to "take care of" Ramon and to "watch [his] back." The evidence shows more than Jimmie's mere presence and is sufficient to support the jury's verdict.

(3) Ramon Calero

Ramon asserts that, as the evidence is insufficient to support the jury's verdict that co-defendants De Virgil and Jimmie participated in a conspiracy, there was no one with whom Ramon could have conspired. Ramon admits that he individually attempted to enter into a drug transaction. As discussed above, the evidence is sufficient to

support the jury's verdict as to both De Virgil and Jimmie, thus rendering Ramon's argument meritless.

B. Motions to suppress

De Virgil argues that Detective Castro illegally stopped her in the airport and that Castro coerced her into giving involuntary consent to the search of the cosmetics case. Ramon argues that Castro illegally stopped him in the airport and illegally seized the cosmetics case from him.

This court has "long pitched the standard of review for a motion to suppress based on live testimony at a suppression hearing at a high level."[13] When a judge bases a finding of consent on the oral testimony at a suppression hearing, "the clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses."[14] This court will not disturb the district court's findings under the clearly erroneous standard unless it has a " 'definite and firm conviction that a mistake has been committed.' "[15]

An officer must have a reasonable suspicion to believe a crime is being or is about to be committed to make an investigatory stop.[16] Reasonable suspicion must

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[13] *United States v. Randall*, 887 F.2d 1262, 1265-66 (5th Cir. 1989).

[14] *United States v. Sutton*, 850 F.2d 1083, 1086 (5th Cir. 1988).

[15] *Id.* at 1085 (quoting *Campos v. Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989)).

[16] *Terry v. Ohio*, 392 U.S. 1 (1968).

be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."[17] The defendants argue that Detective Castro did not have a reasonable suspicion when he made the investigatory stop in the airport, relying on *United States v. Glass*,[18] a case with similar facts in which this court held that reasonable suspicion did not exist.

In *Glass*, a DEA agent received an anonymous phone call informing him that two individuals would be arriving at the Shreveport, Louisiana airport from Fort Lauderdale, a drug source city. At the airport, the agent recognized the two men by their descriptions as they disembarked separately, and watched them as they met and began to walk down the concourse together. The officer and his partners followed the men, overtook them, identified themselves as narcotics officers, and asked the men for identification. After examining their identification and airline tickets and discovering that they were travelling under assumed names, the DEA officer asked the men to accompany them to the men's restroom to be searched, and they consented. During this search, the agent found 540 grams of cocaine and arrested the men. We determined that the facts upon which the agent based the stop of the men were that (1) the agent received a phone call informing him of the arrival of the men, (2) the men arrived from a source city, (3) the men recognized

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[17] *Id.* at 21.

[18] 741 F.2d 83 (5th Cir. 1984).

each other after deplaning, and (4) the men were travelling under assumed names. We found that these facts did not support a reasonable suspicion to justify the stop.

Although the facts of *Glass* are similar to the facts of the present case, the instant facts are stronger and show that Detective Castro had a reasonable suspicion to stop and question De Virgil and Ramon. Here, Detective Castro received a phone call from an identifiable law enforcement source, and the information derived from that communication more clearly identified De Virgil as a possible participant in a drug transaction than did the information from the anonymous phone call in *Glass*. In addition, De Virgil was met at the airport by a nervous-looking man and female companion who immediately took De Virgil's cosmetics case and headed toward the exit with it.

The defendants argue that any consent to the search of the cosmetics case was not voluntary but instead was obtained by coercion. The testimony at the suppression hearing revealed that (1) Officer Castro asked to talk to De Virgil, (2) she consented, (3) she asked Castro to get the case for her from Ramon, not vice-versa, (4) there was no struggle from Ramon in retrieving the case, (5) she agreed to go to Castro's office to make a phone call, and (6) she agreed to open the case. The defendants offer little evidence tending to show that either De Virgil's or Ramon's relinquishment of the case was involuntary. The findings of the district court that the stop was justified and that the defendants gave voluntary consent to the search are not clearly erroneous. Thus, the district court did not err in denying De Virgil's and Ramon's motions to suppress.

After the trial, De Virgil filed a supplemental motion to suppress, alleging that Detective Castro committed perjury at trial. She asserted that Castro had testified at the hearing on the motion to suppress that De Virgil was not under arrest at the airport, but that at trial Castro testified that De Virgil would not have been allowed to leave had she desired to do so. The district court noted that Castro testified at the hearing and at trial that he told De Virgil that she was not under arrest. The district court also pointed to evidence presented both at the hearing and at trial that De Virgil volunteered to telephone New York and consented to go with Castro to his office to make the call. Stating that the record was replete with facts justifying Castro's detention of De Virgil on reasonable suspicion and consent, the district court upheld its previous denial of the motion to suppress. For the reasons stated by the district court, we hold that the district court did not err in denying the supplemental motion to suppress.

C. Extrinsic evidence

During the government's cross-examination of Jimmie at trial, the prosecutor asked Jimmie whether a man named Kenny Winningham had stolen $16,000 from him in a prior, unrelated narcotics deal, and whether Jimmie had ever gone to the apartment of a woman named Pam Aguilar (Winningham's sister) and threatened her and her family over the money. Jimmie denied both events. Jimmie's counsel objected to this line of questioning, but not until after the cross-examination had concluded and the court had taken a twenty minute recess. The objection

was that the questions constituted improper impeachment under Federal Rule of Evidence 608(b).[19] The government responded that the testimony was admissible under Federal Rule of Evidence 404(b)[20] as evidence of similar conduct to show Jimmie's intent to join the conspiracy. The court overruled the objection, stating that Rule 404(b) allowed the testimony.

During the government's rebuttal case, the government called Pam Aguilar as a witness. Before Aguilar testified, Jimmie's counsel renewed his previous Rule 608(b) objection and was joined by counsel for Ramon and De Virgil, who had not jointed in the previous objection. The district court made no specific ruling on this objection and allowed Aguilar to testify. Jimmie's counsel

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[19] Federal Rule of Evidence 608(b) states in part:

Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

[20] Federal Rule of Evidence 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

also requested and received a jury instruction from the district court as follows:

> Before this witness testifies, ladies and gentlemen, the testimony that will be elicited is solely for impeachment purposes. Solely for impeachment purposes, and that is to say that none of the defendants are on trial for anything other than what's on the indictment. I will caution you again later on. This is only for impeachment purposes.

Aguilar then testified that Jimmie came to her apartment and threatened to harm her and her family if Winningham did not give him $16,000 from a drug transaction. Before Aguilar testified on cross-examination, counsel for the defendants requested and received the following jury instruction from the district court:

> Ladies and gentlemen, I want to make sure that you understand again my caution to you. First of all, this is for impeachment purposes only. That's number one. This testimony is not addressed to the defendant Ramon Calero, or to the defendant De Virgil. It is only impeachment as to the defendant Jimmie Calero only. Okay. This is not evidence as to the guilt or innocence of this particular transaction that's before the court, only as impeachment, solely.

Appellants De Virgil and Ramon argue that Aguilar's testimony should have been excluded under Rule 608(b), which prohibits the admission of extrinsic evidence to prove specific instances of conduct of a witness for the purpose of attacking or supporting the witness' credibility. Curiously, Jimmie does not raise this complaint on appeal. The government argues that the district court

properly admitted the evidence pursuant to Rule 404(b), which allows evidence of an extrinsic offense if (1) it is relevant to an issue other than the defendant's character and (2) its prejudicial effect does not outweigh its probative value.[21] The government asserts that Aguilar's testimony on rebuttal is relevant to Jimmie's knowledge of and intent to join the conspiracy and that the probative value of the testimony outweighs its prejudicial effect.

On just what evidentiary rule and purpose the district court based its admission of Aguilar's testimony is unclear from the record. The court clearly admitted the questions posed to Jimmie on cross-examination as substantive evidence under Rule 404(b) after overruling Jimmie's Rule 608(b) objections. As the court allowed Aguilar to testify on rebuttal with no specific ruling on the defendants' reurged Rule 608(b) objections, it appears at first glance that the court admitted this testimony as substantive evidence under Rule 404(b) as well However, the court explicitly and repeatedly instructed the jury both before and after Aguilar testified that her testimony was solely for impeachment purposes.

But we need not determine the bases upon which the district court relied in admitting that evidence because, when evidence is properly admissible on any ground, the district court does not violate the defendant's substantial rights by admitting the evidence in reliance on another ground.[22] In addition, we conclude that Aguilar's

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[21] *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

[22] *United States v. Blake*, 941 F.2d 334, 339 (5th Cir. 1991).

testimony was admissible under Rule 404(b) and that admitting it did not violate Rule 608(b).

If the district court admitted Aguilar's testimony under Rule 404(b), the district court's action should not be reversed absent an abuse of discretion.[23] We find that Aguilar's testimony is relevant to Jimmie's knowledge of and intent to enter into a conspiracy. Thus, the rebuttal testimony is properly admissible under Rule 404(b).

Even if the district court admitted Aguilar's testimony solely for impeachment purposes, we conclude that this does not constitute error under Rule 608(b). We have held that Rule 608(b) "should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue of the case."[24] Jimmie's knowledge and intent are clearly material issues in this case. His denial on cross-examination of his involvement in another drug transaction entitled the government to impeach him by presenting evidence to contradict his testimony as to these material issues. The district court properly admitted Aguilar's testimony.

In arguing that Aguilar's testimony violates Rule 608(b), De Virgil and Ramon rely on the Ninth Circuit's opinion in *United States v. Bosley*.[25] In that case, the district court, during the prosecution's rebuttal, admitted testimony of a witness regarding certain acts by the

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[23] *United States v. Prati*, 861 F.2d 82, 86 (5th Cir. 1988).

[24] *Blake*, 941 F.2d at 338; *United States v. Opager*, 589 F.2d 799, 803 (5th Cir. 1979).

[25] 615 F.2d 1274 (9th Cir. 1980).

defendant which the defendant had denied on cross-examination. The district court instructed the jury to consider the testimony solely for the purpose of evaluating the defendant's credibility.

The appellate court in *Bosley* held the admission to be reversible error under Rule 608(b). In response to the government's argument on appeal that the testimony was admissible under Rule 404(b), the *Bosley* court noted that the district court had refused to admit the testimony as substantive evidence, which was a reasonable use of discretion, and that Rule 404(b) could not form the basis for affirmation on appeal.[26] The Ninth Circuit held that the error in admitting the testimony was harmful because the evidence was damaging to the defendant's credibility as a witness, which was a critical factor in the trial.

Even if we were to agree that the *Bosley* reasoning should control the disposition of the instant case and that the admission of Aguilar's testimony violated Rule 608(b), any error would be harmless. As we have noted, only De Virgil and Ramon raise this complaint on appeal. For there to be harmful error under *Bosley*, Jimmie's credibility as a witness would have to be a critical factor in the determination of Ramon's and De Virgil's guilty. After reviewing the transcript of Jimmie's testimony, we do not find this to be the case. Jimmie gave only a minimal amount of testimony in support of either Ramon's or De Virgil's innocence. Thus, any erroneous impeachment of his credibility as a witness would be harmless.

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[26] *Id.* at 1278.

D. Motions to sever

Following Aguilar's testimony, counsel for the three defendants moved for a mistrial and severance, which the district court denied. Appellants De Virgil and Ramon contend that the district court should have granted a severance on the ground of prejudicial joinder, insisting that Aguilar's testimony concerning Jimmie's previous drug transaction was highly prejudicial to their defense.

In order to prevail, the defendants must show that the district court abused its discretion. They must demonstrate "compelling prejudice against which the trial court was unable to afford protection."[27] We do not find that the defendants have met this burden, as the district court explicitly instructed the jury that Aguilar's testimony was not addressed to De Virgil or Ramon.

E. Jury instruction

De Virgil requested the district court to instruct the jury that "if the jury believes that in fact she was here without the knowledge of any conspiracy, but in pursuit of her own legitimate business, and her own lawful ends, then they should say be their verdict, not guilty." The district court refused to give this instruction, but did instruct the jury that: (1) it must find that "the defendants knew the purpose of the agreement and joined in it with the intent to further the illegal purpose," and (2) "a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of

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[27] *United States v. Long*, 894 F.2d 101, 103 (5th Cir. 1990).

a conspiracy does not thereby become a conspirator." The district court also instructed the jury as to the charge of conspiracy in the indictment, which alleged that De Virgil "willfully, knowingly, and unlawfully conspired, combined, confederated and agreed . . . to possess a quantity of more than five kilograms of cocaine. . . . "

De Virgil argues that her defensive theory – that she may have incidentally but unknowingly aided the conspiracy – was not adequately presented to the jury through the instructions given by the district court. She contends that the charge contained an abstract version of her defense, and that, under *United States v. Lewis*,[28] she was entitled to "a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of [her] defense."

The district court's refusal to include a defendant's proposed jury instruction is reviewed under an abuse of discretion standard. This court must determine whether the requested instruction (1) is a correct statement of the law, (2) is substantially given in the charge as a whole, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.[29] Under this standard, the district court did not abuse its discretion because the charge given adequately presented De Virgil's defense of lack of knowledge.

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[28] 592 F.2d 1282, 1286 (5th Cir. 1979).

[29] *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir. 1990).

F. Sentencing

Ramon and Jimmie assert that the district court erred in the sentencing stage of the trial by finding that the drug transaction involved fifty kilograms of cocaine. The defendants argue that, although many different amounts of cocaine were discussed throughout the transaction, no firm agreement was ever reached and the final transaction involved only one kilogram.

When sentencing a defendant in a drug case, the sentencing court determines the defendant's relevant conduct, which includes the quantity of drugs that was part of the same course of conduct or part of a common scheme or plan.[30] The sentencing court determines relevant conduct by making factual findings based on a preponderance of the evidence, subject to the "clearly erroneous" standard of review on appeal.[31] In addition, the sentencing court is not limited to considering the amounts seized or specified in the indictment in making its findings.[32] As there is evidence in this case that fifty kilograms was frequently discussed, the district court's decision was not clearly erroneous.

The Caleros also argue that the district court erred by using the preponderance of the evidence standard to make the determination of drug quantity, and that so doing deprived them of due process. The defendants request this court to reassess its consistent application of

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[30] *United States v. Woolford*, 896 F.2d 99, 103 (5th Cir. 1990).

[31] *United States v. Mourning*, 914 F.2d 699, 706 (5th Cir. 1990).

[32] *United States v. Thomas*, 870 F.2d 174, 176 (5th Cir. 1989).

the preponderance of the evidence standard in sentencing, and to apply the "clear and convincing evidence" standard in this case. The defendants rely on *United States v. Kikumura*,[33] a Third Circuit case in which the district court made findings of fact that increased the defendant's sentence from thirty months to thirty years. The *Kikumura* court held that because of the extraordinary increase in the sentence by these findings, the district court should have used the clear and convincing evidence standard in making its determination. Thus, the *Kikumura* court carved out an exception, in extreme cases, to the use of the preponderance of the evidence standard. In the instant case, the increase in the defendants' sentences resulting from the finding of fifty kilograms of cocaine does not approach the dramatic increase in *Kikumura*. Absent such an increase, we need not and thus do not consider adopting the *Kikumura* exception to the preponderance of the evidence standard.

Accordingly, the defendants' judgments of conviction and sentences are

AFFIRMED.

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[33] 918 F.2d 1084 (3d Cir. 1990).